APPENDIX.

EXCERPTS FROM THE OPINION OF VICE-ORDINARY MAJA LEON BERRY, OF THE NEW JERSEY PREROGATIVE COURT, RENDERED IN RE CALEF, 109 N. J. EQ. 181.

"* * * The decedent is described in the brief of the respondents as a 'proud and cultured woman, the widow of a railroad financier—alone in the world, surrounded only by her servants and visited infrequently by a few scattered friends.' This description is undoubtedly accurate. Her husband died about 1911, leaving her with a substantial competence, which, in 1919, due to unfortunate investments, had materially dwindled. It was at this time, when she was about seventy years of age, that she met the petitioner, who was ten years her junior, and who describes himself as a 'lecturer, coal broker, trader in stocks and bonds, also promoter of some promising enterprises and patents.' He posed as an expert in financial matters, and previous to his meeting with the decedent, had apparently had a checkered career. He claims to have been a man of substance at this time, but this is open to question, and he had, a short time previous, gone through bankruptcy, but had, to some extent, rehabilitated himself financially. For the ensuing ten years and up until the date of Mrs. Calef's death, he occupied a position of trust and confidence toward her, and was, in his own words, 'the confidential friend and adviser in financial matters,' and had 'full power of attorney against the funds and checking account of Mrs. Calef.' He also had access to her safe deposit box at the Guaranty Trust Company of New York, and, with her, claims to have operated in a joint stock account on the New York Stock Exchange. He operated in his own name but used the funds of both in his trading and there was

nothing in writing to show that Mrs. Calef had any interest in any funds or securities under his control. He had evidently met with some success in conserving Mrs. Calef's assets and increasing her income, but to what extent is not definitely shown. The major portion of the estate of which she died seized she inherited from her brother, who died in 1928. During the entire period of the proponent's acquaintance with the decedent they were closely associated, Mr. Neely residing at decedent's home at Sea Bright every summer, and, at other times, traveling around the country with her or residing at the same hotel, or at a nearby hotel, in New York city, and during this whole period he assumed entire charge of Mrs. Calef's business affairs.

The evidence indicates that Mrs. Calef was mentally capable of transacting business and continued so up until a short time before her death, but that she trusted the proponent implicitly with her affairs. The will was drafted by the proponent's lawyer, to whom he had introduced her a short time before, in the lawyer's office, and in the presence of both proponent and decedent, and was executed by the decedent in proponent's presence.

* * * * * *

That Mrs. Calef did contemplate some change in the disposition of her property after the death of her brother in 1928 is plain and is admitted by the proponent. In the fall of 1928, at her request, Neely had reconveyed the Sea Bright property to her because, as he says, there was no occasion for him to retain the title any longer as his money advances to her had then been repaid, and she desired it because she thought it would look better to have title in her name. Neely's testimony, considered in connection with his affidavit filed in support of the petition for probate, is so inconsistent, shifting and evasive that I regard

it as almost totally unreliable. It is in some particulars in direct conflict with that of witnesses whose truthfullness and disinterestedness cannot be questioned. It is particularly in conflict with the testimony of Judge Truax and Mr. Reussille, two reputable members of the bar of this state, and totally disinterested. His testimony is also in direct conflict with that of Mrs. Reed, of Mrs. Bouse, and, on one point at least, with that of his own witness, Mrs. Clark. He testified that Mrs. Clark introduced Mrs. Calef to Mr. Hume, but this is flatly denied by Mrs. Clark and I think other circumstances indicate clearly that the introduction was by Neely himself. He has testified at least two ways on almost every vital point in the case. He has testified that he kept the will in his traveling bag continuously, and that he did not; in his affidavit filed with the petition for probate he said that after receiving the will he took it to his apartment in New York and filed it away with certain other legal papers; in his answer to cross-interrogatory forty-six he admits that he has no apartment in New York at that time, and then states that he was not sure whether he had such an apartment or not; and, finally, that he was living at Mrs. Calef's home in Sea Bright, to which he returned on the afternoon of the day on which the will was made; that he immediately put the will in a safe deposit box in a bank, and that he did not do so. He named at least six or seven banks and as many hotels where he either had or might have had safe deposit boxes and in which he might at times have kept the will. But I think it extremely doubtful if he has any reliable knowledge as to where the will was at any particular time. His invariable answer was that it might have been in such and such a place. But it cannot be denied that he never actually saw the will itself after 1922 when he had it in Mr. Avery's office. He also stated that Mrs. Calef knew that the will was in

the traveling bag, and that she did not; that he saw the will frequently between the date of its execution and 1929, and that he did not; that he discussed the will with Mrs. Calef between those dates and that he did not. If he ever had it in his possession after 1922, which I very much doubt, it is singular that he cannot definitely name any repository of it during the ensuing seven years, except the now famous traveling bag in which he claims to have kept his own and many of Mrs. Calef's private and valuable papers. Sane persons, and especially astute business men of the type which Neely professes to be, do not usually carry their wills, or the wills of others in which they have a substantial interest, around the country in their pockets or in their traveling bags, particularly where they are maintaining so many safe deposit boxes in responsible financial institutions, as he alleges he did. The usual repository for such valuable papers is a bank, and it is reasonable to assume that a woman of Mrs. Calef's reputed mental caliber would do with her will what any other reasonable prudent woman would do, i. e., place it in her safe deposit box at the Guaranty Trust Company, where, indeed, Neely looked for it after her death. Justifiable inferences to the effect that the will had, to the proponent's knowledge, disappeared and was destroyed long before Mrs. Calef's death, arise from Mr. Neely's frantic efforts to procure the execution of a new will by Mrs. Calef during the period immediately preceding her demise. Fuller made three trips to Mrs. Calef's home for this purpose. On the first trip he was unable to see Mrs. Calef because of her physical condition resulting from an automobile accident; on the second trip, in October, he says he consulted with her about the drafting of a 'codicil'; and on the third trip he arrived too late, as death had intervened. In the summer of 1929 preceding Mrs. Calef's death, Neely endeavored to have

Hume come to Sea Bright for the purpose, as he expressed it, of 'drafting a codicil' to the old will. The effect of this testimony about 'codicils' obviously intended to show the continued existence of the will drawn by Hume, is, to say the least, greatly weakened by the testimony as to the events now to be recited. The day before Mrs. Calef died Judge Truax was hurriedly called by telephone. He prepared at Neely's request, a draft of a will which was proposed she should execute, making Neely her sole beneficiary. Because of Mrs. Calef's condition, Judge Truax very properly would not permit any attempted execution and left the house. He was called back later on the same day, but found Mrs. Calef in a comatose condition and again left without any attempt to have her execute the will. Notwithstanding this situation, Neely and Miss Fahrner, the seamstress, asked the nurse, Mrs. Bouse, to place the pen in Mrs. Calef's hand and guide her hand in the making of a signature. This, of course, is denied, but I accept the testimony of Mrs. Bouse, who has no interest whatever in the matter and no incentive to falsify. On the morning of the day on which Mrs. Calef died, Neely hurriedly called another lawyer, Mr. Reussille, of Red Bank, to prepare a will for Mrs. Calef; but before Mr. Reussille had ever seen the decedent, and while he and Neely were in conversation, the nurse announced Mrs. Calef's death. The testimony concerning what happened upon the visits of Judge Truax and Mr. Reussille is interesting and enlightening. From the condition of the house it was quite evident to Judge Truax that a search for some missing document had been made before his arrival. He says that on his first visit Neely told him that a New York lawyer had drawn a will for Mrs. Calef to sign and also one for Neely to sign, and that Neely then looked through a satchel while he was there and found two drafts of wills, 'one was

for him to sign—I don't know about the other.' Nothing was said about a previously executed will of Mrs. Calef's which had been lost. 'He said he couldn't find a will that was drawn by this attorney in New York.' 'He said it was a will drawn for her to sign.' Judge Truax was again there later that day, about five-thirty in the afternoon, and remained until seven. This was on Sunday, the day before Mrs. Calef died. Late that afternoon Neely telegraphed Fuller: 'Will you not come by train to Sea Bright. Extremely urgent.' Fuller left his home in New York State by automobile about eight P. M. and drove to Sea Bright, a distance of over four hundred miles, arriving there the next day after Mrs. Calef's death. He found Hume already there, but he, too, had arrived too late. Mr. Reussille was called to the Calef home by Neely that morning 'on a matter of life and death.' On his arrival, Neely told him that he had been searching Mrs. Calef's effects for a will but had been unable to find one. It was not indicated to Mr. Reussille whether the search was for an executed will or a draft of a will to be executed.

It will be recalled that during the summer Neely had some communication with Hume and Fuller about drafting a codicil to Mrs. Calef's will. Was it a codicil? And if we turn to Fuller's testimony we find that he actually did draw a new will for Neely immediately after his October visit and sent it, with a copy, to him by mail on November 2d. He says that on October 27th, 1929, he discussed the proposed codicil to her will with Mrs. Calef. Was it a codicil? He says its preparation was deferred. But, was it? When Judge Truax arrived at the Calef home Neely had been searching for wills which had been prepared by a New York lawyer, but had not been executed. He had found one, his own, but not the other which was to have been executed by Mrs. Calef. Had Fuller made a mistake

and prepared a draft of a new will for Mrs. Calef, and sent it to Neely with a draft of his, Neely's proposed new will on November 2d, and forgotten about it? Evidently somebody had prepared such a draft for Mrs. Calef and Neely in his extremity could not find it. Had he found it he need not have called Judge Truax, or Fuller, or Hume, or Reussille; he would have needed no other draft for Mrs. Calef to execute. The one he was looking for, had he found it, might have been executed by her while she was yet 'mentally alert,' these four lawyers would have been saved the inconvenience of their hurried trips to the Calef home, and this controversy would never have come before the court. And this leads to the question: Had not both Mrs. Calef's and Mr. Neely's wills, which Avery saw in 1922, been long since destroyed? And is not that the explanation of all this talk about new wills and codicils after the death of Mrs. Calef's brother? If this will, copy of which is now offered for probate, had not, to Neely's knowledge, been destroyed, why all these frantic efforts to have a new will executed. As early as the first part of October, Neely had requested Mrs. Reed, the wife of Mrs. Calef's physician, to use her influence with Mrs. Calef to induce her to make a will in Neely's favor, and to ask Dr. Reed to use his influence also. It was to deny this testimony on the part of Mrs. Reed that Neely was called before the court in rebuttal and asked the one question on direct examination. Mrs. Reed is a lady of culture and refinement, a disinterested witness, with no incentive to falsify, and I believe she testified truthfully. Of one thing we may be sure; the will was not in existence at Mrs. Calef's death. If it had been in Neely's custody, as he said, he would have found it on November 24th, the day before Mrs. Calef died. But let us assume, for the moment, that the will was in Neely's custody, as he says it was. The bag in which he claims it was kept

was in his room, unlocked, and, without a doubt, easily accessible to Mrs. Calef. In fact, he admits that anyone who wanted to do so could have opened the bag and taken from it the will or any other papers that he had therein, at any time during the summer periods when he had the bag at the Sea Bright house. As against this possibility what is there to show that she did not do so? But Neely says that the bag was on top of the wardrobe and that Mrs. Calef could not get it without getting up on a chair or stepladder, a perilous feat for such an aged lady. But Mrs. Megill, the servant, says the bag was on the floor of the closet and she had to move it in cleaning the room. Why should she lie about it?

There are compelling reasons here for not giving the word of Neely an absolute right of way. All of his testimony respecting custody of the will and access or opportunity to repossess by Mrs. Calef, and, in fact, almost his entire testimony, is such as could be denied by no one except Mrs. Calef. And her voice is silenced by death. Neely has undoubtedly testified falsely in some particulars. 'Falsus in uno, falsus in omnibus.' And while I need not, of course, discard all his testimony, I have no hesitancy in saying that I place very little reliance upon it.

* * * * * *

Nor is Fuller's testimony to be accepted at its face value any more than is that of Neely. Fuller is entirely too much interested in this controversy to be an impartial witness. He has, if anything, taken a more lively interest in the affair than Neely himself; at least so far as could be observed by the court. I do not recall that he missed any sessions of the court when any testimony was taken. He attended before the commissioner as counsel for Neely at the time of Neely's deposition in Albion, New York, and later when it was

found that these depositions were defective, he went to the commissioner's office with Neely, and, without any notice to opposing counsel, with the commissioner, attempted to revamp these depositions, but due to their admitted defects, they were excluded from the record. He was present at the taking of Neely's deposition in Miami, Florida, which covered a period of over a week, and attended every session before the master, acting as counsel for the proponent. Although not recorded as such by the master, it so appears from opposing counsel's statement on the record which was not denied by either Neely or Fuller. He has been a bosom friend of the proponent for many years, visiting him from time to time at Mrs. Calef's home in Sea Bright, and in the fall of 1929, with an alacrity worthy of a younger man, responded to Neely's urgent calls, as already related.

* * * * * *

Clearly, the proponent's case must stand or fall by his own testimony, and that of his two New York lawyers, Hume and Fuller, who are his main supports. Without their testimony respecting delivery and custody of the will, the whole case would fall. They are all biased and interested witnesses. Neely is the chief beneficiary of the will. Hume and Fuller are the guiding hands in this controversy. Both have acted in the dual capacity of witness and counsel, and they were over-zealous. In the last analysis, as already indicated, Hume's testimony is not important, and it might be given full credence, and yet, proponent's case must fail because of the unreliability of his testimony and that of Fuller. Both are in the discard."

OPINION OF UNITED STATES DISTRICT COURT JUDGE FAKE.

(Filed January 17, 1939.)

The plaintiff herein seeks specific performance of an alleged oral agreement made by Eliza A. S. Calef with him on or about September 10, 1921, whereby she agreed, among other things, to "execute and leave on her death, her last will and testament, wherein she would provide that plaintiff should be her residuary legatee and devisee", and also to make plaintiff the executor of said will.

The said Eliza Calef departed this life on November 25, 1929 intestate. Thereafter, proceedings were brought in the Prerogative Court of New Jersey to probate a carbon copy of a will alleged to be the last will of Eliza A. S. Calef. This resulted in a denial of probate by the state court and a final holding that the original will had been destroyed *animo revocandi.* In dealing with the subject matter involved in that proceeding, the learned Vice-Ordinary filed an exhaustive opinion, in the course of which he said, as bearing upon the credibility of plaintiff: "There are compelling reasons here for not giving the word of Neely an absolute right of way. All of his testimony respecting custody of the will and access or opportunity to repossess by Mrs. Calef, and, in fact, almost his entire testimony, is such as could be denied by no one except Mrs. Calef. And her voice is silenced by death. Neely has undoubtedly testified falsely in some particulars. *'Falsus in uno, falsus in omnibus.'* And while I need not, of course, discard all his testimony, I have no hesitancy in saying that I place very little reliance upon it." *In re* Calef's Will, 109 N. J. Eq. 181; 156 Atlantic 475.

So likewise here, the testimony of Neely, his attitude on the witness stand and his general demeanor before the Court has led me to accept his testimony on material matters, only when corroborating circumstances have been found to support his position.

At the time of their first meeting, Mrs. Calef and Mr. Neely were well along in years, she a widow, and he a widower. This acquaintance ripened into a strong platonic friendship. Both were without family encumbrances and undoubtedly found comfort in each other's society. They resided at times under the same roof at her shore home known as "Bagdad", and at divers hotels and other places always occupying different bedrooms. That he desired to and did assist her in her tangled business affairs during the years of their companionship, there can be no doubt, and that she was grateful to him and appreciative of such services at times there also can be no doubt. But the evidence before me is not strong enough to permit the conclusion that she made an agreement with him as hereinbefore outlined or if any such agreement was made that he performed the same on his part.

The consideration for the alleged agreement to leave a will as aforesaid was an undertaking and promise on the part of Neely to render services to Mrs. Calef in her business affairs during her lifetime, and also for past services of a like nature theretofore rendered by him. There is nothing definite as to what those services were to consist of other than that he was to invest such funds as she had and account to her for the same when requested, and clear up a bad situation in her affairs which unwise investments had theretofore occasioned. How he handled her accounts in this connection therefore became a matter of prime importance in this case, since it would be encumbent upon him to be in a position at any time during the life of Mrs. Calef, to render her on account of his dealings with her funds. Unless Neely could so account, specific performance cannot be decreed, since he comes into equity with unclean hands. Moreover, his right to relief here must be based upon his performance as a condition precedent.

It became apparent at the trial that a detailed accounting by Neely would be a controlling factor in the case, and an order of reference was therefore made to a Master. The

Master has made and filed his report, and after considering the objections thereto, I am of the opinion that the same should be confirmed in all things. It discloses that Neely was charged with $42,541.82 and could be discharged for $1,354.38 only, leaving him unable to account for the sum of $41,187.44.

It therefore appears that even if Mrs. Calef did enter into an agreement as alleged with Neely, he has not performed the terms and conditions thereof with which he was burdened.

A decree will be entered for the defendants in conformity herewith.

EXCERPTS FROM REPORT OF SPECIAL MASTER APPOINTED BY DISTRICT COURT JUDGE FAKE.

"1. That from about September, 1921, to the time of her death on November 25th, 1929, Mr. Neely had power of attorney to act for Mrs. Calef and was entrusted by her with control over and management of her property and financial affairs (p. 140, 141, 226, 226, 443, 545).

"2. That, notwithstanding any intent Mrs. Calef ever may have had in respect to testamentary disposition of her property, her intent and understanding during said period was that Mr. Neely, as her trusted agent, was managing her property and financial affairs for her, as her separate estate, and that, aside from their joint stockmarket speculations, she was in no sense going along in joint account with him.

"3. That Mrs. Calef was meticulous in keeping account of her separate property, credits and liabilities, and particularly in respect to adjustment of charges

against and credits due to Mr. Neely insofar as she had knowledge of the facts (pp. 471-472; Ex. P-64; pp. 241-247; &c).

"4. That the existence of the mutual wills, by which the survivor would take all, made it seem to Mr. Neely that it would ultimately prove to be immaterial whether he treated Mrs. Calef's property as being hers or as being his.

"5. That Mr. Neely did treat and deal with the property and money of Mrs. Calef **as if** he and she were going along in joint account, upon the belief or assumption that whatever she died possessed or seized of (except a few legacies) would come to him by her will.

"6. That Mr. Neely relied upon the existence of Mrs. Calef's said will in his favor, and expected never to be called upon to account for his dealings with and management of her property and financial affairs.

"7. That in all his said stock market transactions involved in said brokers' accounts (excepting the Fahnestock account and the Clark, Childs & Co. account to which it was transferred in the name of 'F. T. Neely, No. 2', both of which were the sole property of Mrs. Calef), Mr. Neely was 'going along in joint account' with Mrs. Calef **whose money and securities were used,** with some contributions by Mr. Neely, to finance and margin said accounts" (R. 1122-3).

* * * * * *

"Mr. Neely charges himself only with those items which defendants' accountants had discovered and charged him with before the order of reference was made. He makes no attempt to show **all** moneys and

securities of Mrs. Calef which came into his hands or under his control (p. 92). He attempts merely to establish credits sufficient to off-set the aforesaid few items of charges. He says (p. 311): 'It is admitted that the moneys came to me. * * * We are trying to prove that moneys were returned.' He renders no complete account of their stock market ventures (p. 370).

"He claims that the records which would exonerate him have been lost; that Mrs. Calef's records, together with many of his own, were in a trunk at Bagdad which was sold at auction after the effects of Mrs. Calef's estate had been taken charge of by the administrator **pendente lite;** that a certain bag that was marked in evidence in the will case contained papers and records that would be helpful on this reference; that the contents of the bag were turned over to his attorneys (and apparently 'lost', for they were not produced before me); and that he has produced everything he has in writing relative to his dealings with Mrs. Calef's property and financial matters.

"It is clear that since Mrs. Calef's death numerous attorneys have represented and been associated with Mr. Neely in this present suit and in the will case, and that there have been a great many relevant records, memoranda account books, cancelled checks, &c., in the possession of Mr. Neely and his attorneys which have not been produced before me. From the evidence it is impossible to determine who is responsible for the disappearance of them, if they have disappeared. The fact, however, is that the few original papers, checks and records produced are entirely such as Mr. Neely conceives are helpful to him. Furthermore, as the hearings progressed, he was able to find somewhere and produce before me (in at least two instances) additional papers bearing upon questions that had arisen in the course of the examination, even though all exist-

ing records were supposed to have been turned over to his accountant before the examination of witnesses was begun.

"I doubt that plaintiff has produced all available, material records or that he has made as full and complete an account and disclosure as is now possible, but the record does not enable me to find as a fact that he has not done so" (R. 1124-6).

* * * * * *

"I accordingly state the account as follows in respect to such charge as have been proved against him, to wit:

Charges

Total charges as hereinabove set forth	$42,541.82

Discharges

Item A—Mr. Neely's checks to Mrs. Calef's order as above set forth	$ 1,000.00
Item B—Mr. Neely's checks for Mrs. Calef's account	354.38
Items C, D, E, F, G and H disallowed *in toto* as aforesaid	00000000
Total charges	$42,541.82
Total discharges	1,354.38
Excess of charges over discharges	$41,187.44

Respectfully submitted,

CHESTER W. FAIRLIE,
Master" (R. 1137).

OPINION OF CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1939.

[fol. 1735] In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1939

No. 7282

Frank Tennyson Neely, Plaintiff-Appellant,

v.

Merchants Trust Company of Red Bank, New Jersey, as Administrator of the Estate of Eliza A. S. Calef, Deceased, and Frederick H. Tarr, as Ancillary Administrator in the State of Massachusetts of the estate of Eliza A. S. Calef, Deceased, and Mary L. Hodgkins, Harriet G. Stacy, James D. Stacy, Fannie K. Stacy, Mary S. Stacy, Anna S. Lufkin, Gilbert C. McCormick, Harry McCormick, Lola Robinson, Hettie M. Morse, Jennie M. Sayward, Clifford E. Stacy, Fred C. Stacy, Everett Stacy, William A. Hamilton, Doris Alvord, Albert J. McCormick, Defendants-Appellees

Appeal from the District Court of the United States for the District of New Jersey

Opinion—Filed June 29, 1940

Before Biggs, Maris and Jones, Circuit Judges

Biggs, Circuit Judge:

The appellant, Frank Tennyson Neely, alleged in his bill of complaint and offered proof that he and Eliza A. S. [fol. 1736] Calef entered into an oral contract whereby in consideration of services and financial aid rendered and to be rendered by the appellant to her, she would make a last will and testament naming the appellant as her residuary legatee and devisee. Mrs. Calef died without leaving a will admissible to probate and the appellant now seeks specific

performance[1] of the alleged oral contract and also that a trust be impressed upon all of Mrs. Calef's property for his benefit. The appellees are the heirs at law of Mrs. Calef and her administrator and ancillary administrator. The District Court found, first, that the appellant failed to prove existence of the alleged contract, and, second, assuming the existence of a contract, the appellant had failed to carry out his obligations thereunder.

A brief recapitulation of the facts is necessary. Mrs. Calef died at her summer home, "Bagdad", in Seabright, New Jersey, when she was seventy-nine years of age. She left a substantial estate, the greater part of which she had inherited from her brother. At the time she met the appellant, the inheritance referred to had not come into her possession and she was in financial difficulties. She employed the appellant to help her conduct her affairs and to serve as her financial agent. Upon Mrs. Calef's death the appellant produced a copy of what he alleged to be her last will and testament and attempted to secure probate of it before the Prerogative Court of New Jersey. Probate was denied, the court pointing out that if a will is proved to have been within the testator's possession and upon death cannot be found, it will be presumed that it was destroyed by the testator with the intention of revoking it. The appellant claimed that though the will had been in his possession, he had lost it. The Prerogative Court did not credit this statement. In re Calef's Will, 109 N. J. Eq. 181, 156 A. 475, affirmed 111 N. J. Eq. 355, 162 A. 579, certiorari denied 288 [fol. 1737] U. S. 606. Following denial of certiorari, the suit at bar was commenced.

Was the learned District Judge in error in holding that the appellant had not sustained the heavy burden placed

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[1]We so refer to the relief sought by the appellant. Actually the relief sought by the appellant is not technical specific performance. It is rather relief in the nature of specific performance. See Page on Wills, 2nd Edition, 1926, Vol. 1, Section 107, p. 192.

upon him under circumstances such as those at bar of showing by clear and convincing proof the existence of the contract referred to and the appellant's performance thereunder? As was stated by the Court of Errors and Appeals by Justice Fort in Cooper v. Colson, 66 N. J. Eq. 328, 58 A. 337, "Most scrupulous care should be exercised by the courts in this class of cases, and especially where one of the alleged contracting parties is dead. An allegation of an agreement to convey is easily made, and casual conversation or jocular remarks of intent to devise or convey at death can readily be turned into serious import * * * such power should be exercised upon the most clear proof * * * of the contract to devise * * *". See also Lings v. Urquhart, 106 N. J. Eq. 506, 151 A. 391, affirmed 109 N. J. Eq. 131, 156 A. 377; Vreeland v. Vreeland, 53 N. J. Eq. 387, 32 A. 3. Applying the doctrines of the decided cases, we conclude as did the learned District Judge that the appellant failed to sustain that burden of proof necessary to prove the existence of the contract between himself and Mrs. Calef. We shall not dilate upon the proof offered by the respective parties. It is sufficient to state that the appellant's conduct at the time of Mrs. Calef's last illness was not that of an individual who deemed that his rights were protected under a valid and existing contract. While Mrs. Calef was upon her death bed, he endeavored to procure her to make a will in his favor, leaving her entire estate to him, and excluding from her bounty all other persons despite the fact that the paper which he offered for probate as Mrs. Calef's will before the Prerogative Court contained many specific bequests. There is evidence that despite Mrs. Calef's semi-conscious condition he tried to induce her trained nurse to guide the dying woman's hand to sign a will in his favor. Such evidence weighs heavily against the appellant.

[fol. 1738] Assuming, however, that there was a specific contract between the appellant and Mrs. Calef in the terms for which the appellant contends, none the less his performance under that contract was not such as would entitle him to relief. We reach the conclusion as did the court below

that such services as the appellant rendered for Mrs. Calef were rendered in reliance upon her generosity and certain present and definite benefits, and for this reason the appellant is within the rule enunciated by Vice Chancellor Ingersoll who made it clear in Danenhauer v. Danenhauer, 105 N. J. Eq. 449, 148 A. 390, quoting Chancellor McGill in Vreeland v. Vreeland, supra, that while equity would specifically enforce a parol agreement to make a will at the instance of a complainant who has completely performed it upon his part, such a remedy " '* * * is afforded upon the ground that it will work a fraud upon him who, induced by the agreement, has in good faith so performed it as to irretrievably change the situation of the parties to his disadvantage, to permit the other party to refuse fulfillment upon his part.' " It cannot be successfully contended that the appellant has met this test. Moreover the conduct of the appellant immediately preceding and following Mrs. Calef's death was in breach of the duties placed upon him by the alleged contract. During Mrs. Calef's last illness the appellant closed out brokerage accounts in the joint names of Mrs. Calef and himself and deposited at least $50,000 of the proceeds to his own personal account. Upon Mrs. Calef's death the appellant went to Cuba, arriving with $50,000 in cash, carried on his person in a money belt. He also had with him Mrs. Calef's jewelry. We entertain little doubt that the $50,000 referred to consisted largely of moneys belonging to Mrs. Calef's estate. Such conduct speaks for itself.

One point remains to be disposed of. The appellant contends that the contract between himself and Mrs. Calef was established as a matter of pleading in that the learned District Judge upon the appellant's motion struck out the fifth [fol. 1739] paragraph of the answer denying the fifth paragraph of the bill, which alleged the making of a contract between Mrs. Calef and the appellant with the terms and conditions contended for by the appellant. The appellant contends that because of this ruling by the trial court the existence of the contract was not in issue. The trial court did in fact grant the appellant's motion to strike out para-

graph 5 of the answer upon the ground that it was in violation of Equity Rule 24. This was clearly error because the affidavit of appellant's counsel upon which the order of the court was based contained nothing more than a restatement of appellees' counsel's brief in the Court of Errors and Appeals in the proceeding for the probate of Mrs. Calef's will, which recited testimony offered by the appellant in that proceeding. This point need not be dwelt upon further except to state that the learned trial judge corrected his error, as is amply demonstrated by colloquy between himself and counsel appearing in the record.[2] In effect the District Judge overruled his prior order and required the appellant to prove the contract. The effect of the affidavit was to permit the appellant to testify as to matters relevant to the contract allegedly occurring in the lifetime of Mrs. Calef. The appellant's mouth was closed in respect to these transactions because Mrs. Calef was dead. N. J. R. S. 2:97-2.

Other objections stand in the way of granting the appellant the relief sought by him. According to the very terms of the bill of complaint Mrs. Calef's obligation was to make the appellant residuary legatee and devisee only after she had provided for certain unspecified bequests to friends and servants. It follows that the terms of the alleged contract are not sufficiently specific to permit its enforcement. The same objection lies to the prayer of the bill of complaint to the effect that a trust be imposed upon the entire estate for the benefit of the appellant. In addition to all the foregoing it is axiomatic that he who seeks relief in a court of [fol. 1740] equity must come into court with clean hands. In the light of the record in the case at bar we are convinced that the appellant does not come into court with clean hands.

Accordingly the judgment of the court below is affirmed.

A true Copy. Teste:

—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

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[2]See pp. 1633-1683 of the record.

EXCERPTS FROM NEW JERSEY REVISED STATUTES.

2:97-2. Transactions With Lunatic or Decedent.

When one party to any civil action is a lunatic suing or defending by guardian or when one party sues or is sued in a representative capacity, no other party thereto may testify as to any transaction with or statement by the lunatic while of sound mind or with or by the decedent, unless:

a. The guardian of the lunatic or the representative of the decedent offers himself as a witness on his own behalf, and testifies to any transaction with or statement by his testator, intestate or ward, in which event the other party may be a witness on his own behalf as to all transactions with or statements by the lunatic while of sound mind or by the decedent, which are pertinent to the issue; or

b. The action is founded upon any allegation of fraud, breach of trust, willful default or undue influence, in which cases the defendant may be sworn and examined as a witness on his own behalf as to transactions with or statements by the lunatic or decedent.

Where a guardian or representative is a national bank, bank, trust company or other corporation, testimony of an officer or employee thereof shall be deemed testimony of the guardian or representative within the meaning of this section.